No. 92-1103

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HENKEL CORPORATION,

Petitioner,

versus

ROBERT E. TUCK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In resolving employment age discrimination cases at the pretext stage, are the Court and the employee bound to accept as true the names of the "decision-makers" as designated by the employer, and therefore is Respondent required to rebut the employer's alleged "specific reasons" for a challenged employment decision, or can Respondent show "pretext" by evidence that the employer's designated "decision-makers" in fact were not the actual "decision-makers," and that the decision of the actual "decision-makers" more likely than not was based on age bias?

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ADDITIONAL STATEMENT OF THE CASE

The Petitioner's "Statement of the Case," (and indeed Petitioner's entire Petition and Argument) is based solely on Petitioner's contention that "McDonald and Sears were the only decisionmakers in selecting Smith for the reconstituted plant manager position and Tuck's layoff."

Petitioner's Statement of the Case fails to point out clearly to the Court the contentions of both the Petitioner and the Respondent.

After plaintiff made out his prima facie case, creating a rebuttable presumption of age discrimination, the employer articulated as its "legitimate, nondiscriminatory reason" for terminating plaintiff (age 59) on March 1, 1989 and replacing him as Plant Manager of its Sugar Creek Road Plant in Charlotte, N.C.

with Mark Smith (age 37) (Pet. App. A-55), that only Neville McDonald and Brent Sears made the employer's management decision to discharge Tuck for reasons satisfactory to the employer (Pet. App. A-86, & A-98).

The Statement of the Case should have stated that Respondent then presented evidence that Petitioner's articulated reason was "pretext," and should have stated that Henkel Corporation contended that "a workforce reduction occurred in March 1989," but that Robert Tuck's evidence was to the effect that there was no workforce reduction applicable to his termination, as the workforce reduction was only at Petitioner's recently acquired Westinghouse Boulevard Plant (Pet. App. A-56) and that he (Tuck) was the only person affected at its Sugar Creek Road

Plant, where he had been Plant Manager for 12 years; that Henkel Corporation contended that the termination of Tuck was one of its "cost reduction measures" (Pet. App. A-9), but that Tuck's evidence was to the effect that no cost reduction was needed or discussed for the Sugar Creek Road Plant (Pet. App. A-7), as opposed to the Westinghouse Boulevard Plant; that Henkel contended that McDonald and Sears decided that Mark Smith's greater education and technical knowledge best fit their alleged goal for a reconstituted plant manager position (Pet. App. A-2), but that Tuck's evidence was to the effect that no actual change was made in said position at the Sugar Creek Road Plant after his termination (Pet. App. A-130), and further that within a year Henkel Corporation replaced Mark Smith with Tom McKillop as Plant

Manager (Pet. App. A-101 & 127) and that McKillop had no more education or technical knowledge than Tuck (Pet. App. A-63).

The Statement of the Case further should have pointed out particularly that Henkel contended that McDonald and Sears were "the only decisionmakers," whereas Tuck's evidence tended to show that it was not McDonald and Sears who decided on his (Tuck's) termination, but rather that it was Robert Kahn, head of Henkel's Human Resources department in Ambler, Pennsylvania (Pet. App. A-27) (through Mr. Michael Shubert, Human Resources Manager and head of personnel in Charlotte, N.C.) (Pet. App. A-127), in concert with admittedly age biased Dr. Rudy Heer (Pet. App. A-11, 12, 16 & 135), who Mr. Kahn stated had told him (Mr. Kahn) that he no longer wanted Tuck as

Plant Manager at the Sugar Creek facility in Charlotte, Dr. Heer having been Tuck's former direct superior for some time (Pet. App. A-129), and then having been head of the Research and Development Group at the Sugar Creek Road Plant when Tuck was in fact terminated.

Additionally, the Statement of the Case should have made it clear that the employer's evidence is that McDonald and Sears made Henkel Corporation's decision to terminate Tuck, and so advised Mr. Schubert in the Charlotte Human Resources or personnel department just prior to terminating Tuck on March 1, 1989 (Pet. App. A-99), but that Tuck's evidence showed that during consideration of a wage increase for Tuck, which increase had already been approved by Sears (who according to Henkel was one of the decision-makers), signed by Schubert on

December 22, 1988, and forwarded for implementation to Kahn as head of Human Resources in Ambler, Pennsylvania, that shortly thereafter (and nearly three months before Henkel's alleged decision-makers testified that they made their decision to terminate Tuck), Mr. Kahn did not approve Tuck's wage increase, but rather wrote a "Confidential" note on the back of same and returned it to Schubert to handle with Mr. Brent Sears (Pet. App. A-25 through 27), said note reading:

> "CONFIDENTIAL -
> RSK ⟶ M Schubert
> Based on our plans I would ask you and Brent to reconsider the appropriateness of a salary increase."
> (Pet. App. A-122)

The Statement of the Case should have included that Tuck's evidence as to the real decision-makers, and the age

biased nature of that decision, coupled with evidence that no force reduction took place at the Sugar Creek Road Plant, that no monetary reason existed to alter the Sugar Creek Road Plant personnel, that Mark Smith actually made no changes in the Sugar Creek Road Plant, and in fact shortly thereafter was himself transferred and replaced with another Plant Manager with no more education or technical knowledge than Tuck, and that the Research and Development Group, headed by Dr. Rudy Heer when Tuck was terminated, functioned as usual, were all produced by Tuck to show the pretextual nature of Henkel's articulated "legitimate, nondiscriminatory reason" for terminating Tuck, and that same was not worthy of belief.

SUMMARY OF ARGUMENT

Briefly stated, all six of the "Questions Presented" by employer are meaningful only if the employee in an ADEA case is required to accept without question the truth of the employer's articulated "legitimate, non-discriminatory reason" for termination of an employee, which is not the case.

In this instance, Tuck's "pretext" evidence is that the entire story advanced by Henkel Corporation was fabricated, in that McDonald and Sears were not the decision-makers, as Henkel contends, but rather that Robert Kahn, Director of Human Resources in Ambler, Pennsylvania, influenced by age-biased Dr. Rudy Heer, made the decision to terminate Tuck nearly three months before McDonald and Sears allegedly decided on his termination, as particularly

evidenced by a "Confidential" note from Kahn to his subordinate in the personnel department in Charlotte cancelling an approved wage increase for Tuck due to their "plans" -- just prior to Tuck's termination.

Petitioner erroneously argues that the law is that plaintiff's "pretext" inquiry must focus on those specific reasons advanced by the employer for a challenged employment decision.

Based mainly on this erroneous perception of the law, Petitioner has brought this Petition for Writ of Certiorari and argues that the Fourth Circuit's opinion conflicts with that of other circuits, which it clearly does not.

The Fourth Circuit in this case very simply held that the factual evidence presented by Tuck carried his burden of

showing that Henkel's articulated legitimate, nondiscriminatory reason for Tuck's termination was unworthy of credence, such that Tuck should be granted a trial by jury. The case is about the quantum of Tuck's proffered evidence, and not about a departure by the Fourth Circuit from the established law of this Court or of other circuits.

ARGUMENT

I. GENERAL DISCUSSION OF PETITIONER'S SIX "QUESTIONS PRESENTED".

Petitioner has set out six "Questions Presented." All are "evidentiary" questions and none are questions for review by this Court under Rule 10 of the Rules of the Supreme Court of the United States.

All of Petitioner's questions are meaningful only if the trial court and

the employee are required to accept without question the truth of the employer's articulated "legitimate, non-discriminatory reason" for its business decision resulting in termination of the employee in an ADEA case.

In this case, contrary to the situation in most ADEA cases, Tuck's evidence is that the entire story advanced by employer is a fabrication, in that McDonald and Sears, alleged by Henkel Corporation to have been the decision-makers who orchestrated his termination, in fact were not the decision-makers at all, but rather that the true decision-maker was Robert Kahn, Director of Human Resources in Henkel's United States headquarters in Ambler, Pennsylvania, that Tuck's discharge was decided by Kahn nearly three months before McDonald and Sears allegedly

decided on his termination, and that Kahn's decision was influenced by Dr. Rudy Heer, he having been Tuck's former direct supervisor and then being head of Henkel's Textile Chemical Research & Development Group (R & D Group) at the Sugar Creek Road Plant in Charlotte, where Tuck was Plant Manager. From the evidence, the factfinders could easily determine that Dr. Rudy Heer was age biased.

Thus, the only real question presented, same being one for which the answer is too apparent to require argument and certainly not a question for this Court, is whether Tuck was required to rebut Henkel's alleged decision-makers' "specific reason" for his termination, or whether Tuck could show same was "pretext" by showing that Henkel's named decision-makers in fact

were not the actual decision-makers, and thus that their "stated" reasons for his termination are immaterial, as well as being false and therefore unworthy of credence.

II. REBUTTAL TO PETITIONER'S CONTENTION THAT THE APPEALS COURT FAILED TO FOLLOW THE COURT'S REQUIREMENTS IN ANDERSON V. LIBERTY LOBBY, INC. IN EVALUATING TUCK'S PRETEXT EVIDENCE.

Henkel's Petition for Writ of Certiorari (page 8, page 21, and Conclusion on page 29) urges this Court to grant review on the basis of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), alleging that Tuck failed to show that there is a dispute "over facts that might affect the outcome of the suit under the governing law."

Petitioner further states at page 8 in its Petition for Writ of Certiorari:

> "In employment discrimination cases, this Court's governing law recognizes that when an employer advances specific reasons for a challenged employment decision, a plaintiff's pretext evidence must focus on those specific reasons. Burdine, 450 U.S. at 256 (1981)."

Respondent respectfully points out that a perusal of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), at page 256, and at all other pages, fails to reveal any language, directly or by inference, resembling this statement of the law advanced by Petitioner. The statement Petitioner attributes to Burdine simply is a misstatement.

The holding in Burdine, 450 U.S. at 256 (1981), just as in McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973), which Burdine cites, is that after the employee establishes its prima facie

case, and after the employer presents its legitimate reason for its action, "plaintiff will have a full and fair opportunity to demonstrate pretext"..."to demonstrate that the proffered reason was not the true reason for the employment decision," and ultimately of persuading the court that the employee was the victim of intentional discrimination, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

No Court, to the knowledge of the undersigned, has ever <u>required</u> the plaintiff's "pretext" inquiry to focus <u>only</u> on "those <u>specific</u> reasons" articulated by the employer, albeit in most cases there is no dispute as to the decision-makers, thus the pretext inquiry

will be focused on the specific reasons articulated by the employer.

In offering proof that Henkel's named decision-makers were not in fact the actual decision-makers, Tuck here went to the very heart of the matter, showing the Court that Henkel's "explanation is unworthy of credence" in all respects, thus returning to Tuck the original presumptions of discrimination raised as a matter of law by his prima facie showing.

All of Tuck's evidence is directly in keeping with the decisions of this Court and of all circuits which have addressed the burdens and the order of presentation of proof in ADEA cases.

Likewise, the decision of the Fourth Circuit in this case (Pet. App. A-54, et seq.) in no way departs from those of this Court or of other circuits.

III. A. DID THE FOURTH CIRCUIT'S PRETEXT ANALYSIS CONFLICT WITH OTHER CIRCUITS' ANALYSIS?

B. WAS THE FOURTH CIRCUIT MISTAKEN IN RELYING ON EVIDENCE OTHER THAN THE COMPANY'S EXPLANATION OF SMITH'S SELECTION AS PLANT MANAGER IN PLACE OF TUCK?

C. DID THE FOURTH CIRCUIT'S DECISION SANCTION JURIES IN "SECOND-GUESSING" EMPLOYERS' BUSINESS JUDGMENT UNDER THE ADEA?

Lengthy and scholarly rebuttal could be made to each of Petitioner's contentions urging an affirmative reply with respect to the above three questions argued in its Petition.

As to all of these arguments advanced by Henkel, again, each would only be applicable if prefaced by a requirement that the trial court and the employee be bound to accept as true the names of the "decision-makers" as designated by the employer, and be

precluded from showing that the "decision-makers" designated by the employer were fabricated, and thus that their "legitimate, nondiscriminatory reason" advanced for otherwise apparent discriminatory action is not worthy of credence.

The important point for this Court to recognize is that the Fourth Circuit simply has ruled that Tuck has presented sufficient evidence of pretext for this case to be heard by a Jury, and has then gone on to set out the many respects wherein Tuck's evidence tends to show that "pretext."

The Fourth Circuit's decision conflicts with the decisions of no other circuits or of this Court, nor does Respondent disagree with said decisions or urge here any change in said decisions.

The Fourth Circuit's opinion clearly restates the analysis factors set out in McDonnell Douglas, Burdine, and other cases which have spoken on the subject.

The Fourth Circuit reviewed Tuck's prima facie case, and agreed that Henkel met its rebuttal burden of presenting legitimate, nondiscriminatory reasons for Tuck's termination. It did not require Henkel to "prove" its proffered reasons, but only to articulate same.

However, the Fourth Circuit ruled that the District Court erred in weighing Tuck's evidence that Henkel's asserted reason was a mere pretext, ruling that Tuck has shown that Henkel's rationale is unworthy of credence, thus that Tuck has carried his burden and is entitled to trial. This in no way departs from the established law in ADEA cases.

In fact, the Fourth Circuit fully

acknowledged Petitioner's arguments that what is important in ADEA analysis is the employer's reason for dismissing the employee at the time the decision is made, not what might have transpired afterwards, and stated that even so, it is relevant to consider in assessing the credibility of Henkel's story what happened after Tuck's termination, it being the place of the jury, not the Court, to decide if such evidence suggested that Henkel's story is false. In support of Tuck's contention that Henkel's story was a fabrication, it certainly is admissible and material to show that not one of the employer's stated reasons for needing Mark Smith's superior educational background, as opposed to Tuck's expertise as Plant Manager, was true.

Burdine, at page 259, covered this

point when it said "...The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination" (emphasis added).

The Fourth Circuit decided that Tuck had presented sufficient evidence to create a material dispute as to whether age is a more likely reason for his dismissal than Henkel's asserted reason, as well as some probative evidence that Dr. Heer, Tuck's former Supervisor, was biased against older workers and that Heer influenced the decision to fire Tuck. The Court pointed out that Tuck contended Kahn, influenced by Heer, who was head of the R & D Group and thus the largest beneficiary of Tuck's discharge,

was the real decision-maker, while Henkel contended otherwise.

Their opinion went on to point out that in open court the District Court below expressed concern over Heer's age bias and whether he influenced Tuck's dismissal, but was ultimately persuaded in Henkel's favor, and so resolved that factual issue against Tuck.

By making this determination, the Fourth Circuit ruled that the District Court, which itself recognized the factual dilemma (Pet. App. A-12 through 16), denied Tuck the benefit of all permissible inferences, it being the jury's job at trial to weigh the evidence, and not the Court's business to do so at summary judgment.

It is respectfully submitted that this case presents only a question of sufficiency of evidence and that there is

absolutely nothing in the Fourth Circuit's opinion which brings this case within the group of decisions reviewable by this Court pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

IV. REBUTTAL TO PETITIONER'S CONTENTIONS THAT THE APPEALS COURT ERRED IN CONCLUDING TUCK'S EVIDENCE SUPPORTS A VERDICT OF AGE DISCRIMINATION UNDER RULE 56.

Again, on pages 22 and 23 of its Petition, Henkel places great reliance on Liberty Lobby, arguing that Tuck's proffered evidence reveals no genuine issue of material fact, and again stating that "only Sears and McDonald made the management decision to select Smith over Tuck for the reconstituted plant manager position," and again stating, at page 23, that "for Tuck's evidence to be significantly probative as required by

Liberty Lobby, such evidence should involve actions or statements of these two officials..." citing "Mechnig, 864 F. 2d at 1366 (evidence of pretext requires evidence of actual decisionmakers)."

In the first place, as heretofore pointed out, this case and the Fourth Circuit's opinion are about the amount and nature of Tuck's evidence, and not about conflicts in ADEA law among circuits.

In the second place, Liberty Lobby was a libel action and not a discrimination case. While it discussed various rules with respect to summary judgment, more appropriate to Tuck v. Henkel Corp. is the following from Thornbrough v. Columbus & Greenville Railroad Co., 760 F. 2d 633 (5th Cir. 1985), at page 640:

> "In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent" (citing cases to the same effect), "which depends on complicated inferences from the evidence."

In the third place, in Mechnig v. Sears, Roebuck & Co., 864 F. 2d 1359 (7th Cir. 1988), there having been no contention by Mechnig that Hawley and others were not the true decision-makers involved in Mechnig's termination for falsifying time cards, that case, and the accepted law that statements from non-decision-makers are insufficient are not applicable to the Tuck case.

Tuck is making no attempt to have the Court reexamine Henkel's business decisions, or interfere with its decisional process. What Tuck has done is present substantial probative evidence that Henkel's alleged "business

decisions" had nothing to do with his termination, that while McDonald and Sears may well have decided that Mark Smith would replace Tuck, the decision that Tuck should be terminated was made some months before by Henkel's Human Resources or personnel department in Ambler, Pennsylvania, and that Henkel's alleged business explanation was unworthy of credence. In fact, Tuck and the Fourth Circuit opinion are in complete agreement with the proposition stated in Mechnig, 864 F. 2d at 1365, that the inquiry is "whether the employer gave an honest explanation of its behavior," nothing more. To determine that, clearly all aspects of Henkel's alleged explanation for Tuck's termination bearing on the credibility of same may be explored.

CONCLUSION

The decision of the Fourth Circuit reversing summary judgment for the employer is entirely compatible with every circuit's rules governing summary judgment and with every circuit's analysis of the special rules of proof fashioned by the courts in ADEA cases.

The problem Petitioner faces, and no doubt one of the reasons for its Petition to the Supreme Court, is that if the Jury determines that those persons Petitioner claims were the "decision-makers" in fact were not, then the employer will have offered no "legitimate, nondiscriminatory reason" why someone else was preferred as Plant Manager over the plaintiff; plaintiff will have recreated the situation that obtained when his prima facie case was initially established; and, in the absence of any known or

articulated reasons for the employer's decision (by the actual decision-makers), the factfinders would be required to presume that the employer was motivated by discriminatory reasons [Thornbrough v. Columbus & Greenville Railroad Co., 760 F. 2d 633 (5th Cir. 1985), at pages 639 and 640]. In addition, Respondent's evidence of the actual age bias motivating the decision of the actual decision-makers makes wilful discrimination inescapable.

Contrary to Petitioner's contentions, this is entirely in keeping with the decisions of all other circuits, as well as with Burdine and Liberty Lobby, thus this Court should decline to review the decision of the Fourth Circuit.

Respectfully submitted, this 20th day of January, 1993.

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